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September 13, 2012

Texas Commission on Environmental Quality
Office of Chief Clerk MC105
Melissa Chao
P.O. Box 13087
Austin, Texas 78711-3087

Re: TCEQ Docket No. 2012-1696-MIS-U
Salado at Walnut Creek Partners, LLC
Watersbend Apartments Use Determination No. 15502

1. A Negative Use Determination was issued by the Executive Director of TCEQ on July 13, 2012, as to the property referenced above.
2. An appeal was filed by Salado at Walnut Creek Partners, LLC on August 3, 2012.
3. The attached Brief is filed on behalf of the Chief Appraiser of Travis Central Appraisal District in response to the appeal filed by Salado at Walnut Creek Partners, LLC.

Sincerely,


Judith A. Hargrove

JAH/ip
Enclosure

cc: Ms. Marya Crigler, Chief Appraiser
Travis Central Appraisal District
Via Facsimile: 512-835-5371

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Texas Commission on Environmental Quality

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**BRIEF OF THE CHIEF APPRAISER OF TRAVIS CENTRAL
APPRAISAL DISTRICT IN RESPONSE TO APPEAL BY SALADO
AT WALNUT CREEK PARTNERS, LLC
WATERSBEND APARTMENTS**

TCEQ Docket No. 2012-1696-MIS-U

TO THE COMMISSION ON ENVIRONMENTAL QUALITY:

I. STATEMENT OF FACTS

On August 3, 2012, Appellant filed its Appeal of the Negative Use Determination issued for the subject property described above. See *Exhibit "I"*. Appellant claims that the first floor apartment units should be exempt as pollution control property. In its Application, Appellant described the property described as "fugitive emissions containment structures" for which it is requesting exemption:

"Structures used to contain, for monitoring purposes, emissions released from decomposing materials. 1st floor level of onsite buildings house pollution control equipment (continuous emission monitors) used to detect VOCs. Monitors must be in an enclosed space to function and operate correctly, in order to protect residents within and above".

See *Exhibit "I-A"*.

On July 13, 2012, The Executive Director issued a Negative Use Determination for the First floors of the buildings located at the property, and a positive use Determination for the remainder of the property included in Appellant's application. See *Exhibit "2"*.

In its Appeal of the July 13, 2012 Negative Use Determination, Appellant claims that "in 2007, the owner received a Positive Use Determination for the first floor units which were described as "fugitive emissions containment structures, and building for active gas extraction

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system". TCAD disputes this assertion. The Use Determination referred to by Appellant was issued by the Executive Director on April 10, 2007, and is attached to their Appeal as *Exhibit "B"*. It does not state, however, that the first floor apartment units were determined to be exempt. In fact, it renders a "Negative Use Determination for the 594,208 sq. ft. of real estate which is being used to house a commercial apartment complex". *Exhibit "I-B"*

In reviewing Wells Fargo's 2007 exemption application, Travis Central Appraisal District ("TCAD") did not interpret the April 10, 2007 TCEQ Use Determination as granting the exemption for the first floor apartment units, and thus did not exempt that part of the property's value. Wells Fargo sued TCAD in district court, and obtained a judgment directing TCAD to exempt the value of the first floor apartment units for 2007. Prior to rendition of that judgment, however, TCAD had already determined the appraised value for 2008, which did not exempt the first floor apartment units. Similarly, Wells Fargo did not appeal TCAD's appraisals for 2009, 2010, or any subsequent tax years. As a result, the appraised values of the property since 2007 have not exempted the first floor apartment units. Litigation is currently pending between TCAD and Wells Fargo as to this issue.

The constitutional authority for the legislature to enact the pollution control exemption at issue in this appeal authorizes the exemption only for "real and personal property used as a facility, device, or method for the control of air, water or land pollution *that would otherwise be taxable for the first time on or after January 1, 1994*". ARTICLE VIII, SEC 1-L, TEX CONST. (emphasis added). In its Application, the property owner represented to TCEQ that the "fugitive emission containment structures" were not taxable on or before January 1, 1994. See *Exhibit "I-A, p.1"*. This is not accurate; in fact the subject apartments were taxable prior to January 1, 1994. *Exhibit "3"*.

Texas Tax Code §11.31(a), the enabling legislation for the pollution control exemption, provides that “property used for residential purposes...is ineligible for an exemption” as pollution control property. It is undisputed that the first floor apartment units at the property are used for residential purposes.

II. ARGUMENT AND AUTHORITY

The July 13, 2012 Negative Use Determination under consideration in this Appeal correctly recognizes the reality that the apartment units in question are not “pollution control property”. The fact that pollution control equipment, in the form of fugitive emission monitors, are located in the first floor apartments does not mean that the apartments themselves are pollution control property. If that were the case, property owners could convert otherwise taxable real property improvements into exempt “pollution control property” by simply housing pollution control equipment inside those structures.

In addition, the Use Determination correctly applies the legal authorities cited above, which specifically prohibit exemption of the apartments themselves. First, ARTICLE VIII, SEC 1-1, TEX CONST. authorizes the exemption only for “real and personal property used as a facility, device, or method for the control of air, water or land pollution *that would otherwise be taxable for the first time on or after January 1, 1994*”. The apartments in question were taxable prior to January 1, 1994, thus they are not legally entitled to the exemption. Exemptions from taxation must be constitutionally authorized, and language authorizing the exemption must be strictly construed, otherwise the exemption is without constitutional authority. *North Alamo Water Supply Corp. v. Willacy Co. Appraisal Dist.*, 804 S.W. 2d 894 (Tex. 1991).

Further, Texas Tax Code §11.31(a) prohibits granting the exemption for the apartment units. It provides that “property used for residential purposes...is ineligible for an exemption” as pollution control property. The first floor apartment units at the property are not vacant or used solely to house the emissions monitors; they are rented to the public and lived in apartments. In other words they are used for residential purposes, thus they do legally qualify as “pollution control property”.


Appellant’s representation to the Commission that the first floor apartments qualify as pollution control property is misleading. Appellant is aware that property taxable prior to January 1, 1994 is not legally entitled to the exemption, yet they continue to urge that the subject apartments, which they know were taxable prior to January 1, 1994, qualify for the exemption. See *Exhibit “1-A”*. See also, Wells Fargo’s 2007 Application, in which it affirmatively represents that the property for which they seek exemption was not taxable prior to January 1, 1994. See *Exhibit “1-B”*.

Finally, the Chief Appraiser disputes Appellant’s assertion that the 2007 Use Determination issued to Wells Fargo exempted the first floor apartment units. Appellant is misinterpreting the April 10, 2007 Use Determination, which clearly states that there was a “Negative Use Determination for the 594,208 sq. ft. of real estate which is being used to house a commercial apartment complex”. See *Exhibit “1-B”*. In reliance on the negative determination for the apartment units themselves, TCAD did not exempt that part of the property. This issue is currently, and has been for several years, the subject of pending litigation pending between TCAD and Wells Fargo. The July 13, 2012 Use Determination under consideration in this Appeal is in accordance with TCAD’s interpretation of the April 10, 2007 Use Determination, and TCAD contends it is a correct application of the facts and the law. TCAD urges the

Commission to confirm the Executive Director's Use Determination in this Appeal, since it was correctly determined, and because it will likely resolve the long-pending litigation between the owners and TCAD.

Respectfully submitted this 13th day of September, 2012.

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By: 
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the following on this the 13th day of September, 2012.

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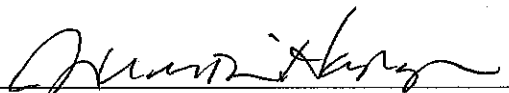
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